In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1605

NICHOLAS R. FINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR TBE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the constitutionality on its face of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520), and contend that, in any event, proper procedures were not followed within the Department of Justice for authorizing the submission to the court of an application for a wiretap order; they further contend that the wiretap order was based on an unconstitutional presumption.

An indictment returned in the Western District of New York charged that petitioners conducted a gambling business in violation of 18 U.S.C. 1955 (count 2) and conspired with six unindicted co-conspirators to commit that offense, in violation of 18 U.S.C. 371 (count 1). After a jury trial, petitioners Agro and Randazzo were convicted on count 2; the other petitioners were

convicted on both counts.[1] Nicholas Fino received
current sentences of imprisonment for three year
each count and was fined $30,000. Giallella, All
and Tripi received concurrent sentences of imprison
for eighteen months on each count. In addition,
was fined $5,000 on each count. Randazzo was sente
to imprisonment for eighteen months and fined $5
Rosalie Fino and Agro received suspended sent
and were placed on probation for two years. The
of appeals affirmed (Pet. App. A).

Evidence at trial included information obtained
court-ordered wiretaps placed on telephones at
residences of petitioners Nicholas Fino and Agro
unindicted co-conspirator Angela Tomaselli.

1. Petitioners challenge the constitutionality of
presumption for warrant purposes contained in
U.S.C. 1955(c) regarding the volume of revenues
gambling enterprise.[2] They argue that the district c

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[1] One defendant was acquitted and another, now deceased
also convicted only on count 2.

[2] 18 U.S.C. 1955(a) makes it a federal offense to co
an "illegal gambling business", defined in subsection (b)
gambling business which is in violation of state law, in
five or more persons, and "has been or remains in substa
continuous operation for a period in excess of thirty da
has a gross revenue of $2,000 in any single day."

18 U.S.C. 1955(c) then provides:

"If five or more persons conduct, finance, manage, supe
direct, or own all or part of a gambling business and
business operates for two or more successive days, then, f
purpose of obtaining warrants for arrests, interceptions, and
searches and seizure, probable cause that the business r
gross revenues in excess of $2,000 in any single day sh
deemed to have been established."

in authorizing the wiretaps, relied upon that presumption and that this violated their Fourth ment rights to have a court make an independ finding judgment before issuing a warrant. Bu district judge who issued the wiretap orders a on the appellants' suppression motion noted in his "there is no indication either in the application of authorization indicating that the presump relied upon" (A. 84).[3] Indeed, as the court o held, the affidavits for the wiretap orders show cause that the business had been in continuous for a period in excess of thirty days.[4]

In any event, the presumption is constitutio brief in opposition in *Palmer* v. *United States,* certiorari denied, 409 U.S. 874, sets forth th why Section 1955 has been properly uphel claims of constitutional infirmity like those tioners here.[5] We there point out that the authorized by the statute was based upon able determination by Congress following

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[3] "A." refers to the appendix to petitioners' br court of appeals, which we are lodging with the Cl Court.

[4] For example, an F.B.I. agent's affidavit for the showed that surveillance was conducted on the gamblin from October 1970 until March 16, 1971 (A. 40). T recited how confidential informants had provided info this operation during the preceding year and had g of its operation which covered most of the month 1971 (A. 27-46).

[5] We are providing petitioners' counsel with a c *Palmer* brief. See also *United States* v. *Harris,* 460 (C.A. 5), certiorari denied, 409 U.S. 877; *United Sta* 460 F. 2d 454 (C.A. 3); *DiMario* v. *United Stat* 6353, certiorari denied, May 21, 1973.

hearings; that the statute does not usurp the function of the magistrate, since he still must determine in each particular case whether the essential facts giving rise to the inference are present; and that it would be inappropriate to strike down a reasonable presumption establishing probable cause for issuance of warrants that would be upheld if utilized for the purpose of establishing guilt (see our brief in *Palmer,* pp. 5-7).

2. Petitioners argue that the wiretap statute, 18 U.S.C. 2510-2520, is unconstitutional on its face. The court of appeals, in rejecting petitioners' attack on the constitutionality of the wiretap statute, cited its opinion in *United States* v. *Tortorello,* (No. 72-1957, C.A. 2, decided April 5, 1973, pending on petition for a writ of certiorari, No. 72-1703), upon which we principally rely here. We note that similar attacks on the wiretap authorization statute have been rejected by every other court of appeals which has ruled on the constitutionality of the statute. See *United States* v. *Whitaker,* 474 F. 2d 1246 (C.A. 3), certiorari denied, No. 73-1317, June 18, 1973; *United States* v. *Bobo,* (No. 71-2077, C.A. 4, decided April 23, 1973); *United States* v. *Cox,* 462 F. 2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72-5278; *United States* v. *Cox,* 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934.

3. Petitioners also object to the Department of Justice's internal procedures (which have now been revised) for authorizing the application for the wiretap order. In the present case, government affidavits filed in the district court showed that the application for the wiretap order involved here was personally authorized by then Attorney General John N. Mitchell, after it had been processed through the standard procedures within the Department of Justice as set forth

in detail in our petition for certiorari and in our br in *United States* v. *Giordano,* No. 72-1057, certior granted, March 26, 1973. Whether that proced comports with the requirements of 18 U.S.C. 2516 is an issue now pending before this Court in *Uni States* v. *Giordano, supra,* and *United States* v. *Chav* No. 72-1319, certiorari granted, May 21, 1973.[6]

The Court may therefore wish to defer disposition the present petition pending its decision in *Giord* and *Chavez.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[6] We are providing petitioners' counsel with a copy of our b in *Giordano* and *Chavez.*